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THE POWERS OF COURTS OF EQUITY.

III. LEGAL EFFECTS OF EQUITABLE DECREES.

To a considerable extent the legal effects¹ of equitable decrees have already been discussed, but there remain to be considered certain phases of the matter not directly connected with our discussion of equitable procedure. It must first be noted that it has often been denied that, in the absence of statutes, equitable decrees have legal effects comparable to the effects of judgments at law. In this connection one learned writer says:

"Indeed, it may be stated broadly that a decree in chancery has not in itself (*i. e.*, independently of what may be done under it) any legal operation whatever. If a debt, whether by simple contract or by specialty, be sued for in a court of law, and judgment recovered, the original debt is merged in the judgment, and extinguished by it, and the judgment creates a new debt of a higher nature, and of which the judgment itself is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree. Undoubtedly it has often been said by chancellors that their decrees are equal to judgments at law, but that only means that they will, to the extent of their power, secure for their decrees the same advantages that judgments have by law; it does not mean that a decree is by law equal to a judgment. Again, if a claim be made the subject of an action at law, and judgment be rendered for the defendant upon the merits, the judgment is conclusive evidence that the claim was not well founded, and it will therefore furnish a perfect defence to any future action upon the same claim; but a decree in equity against the validity of a claim is never a defence to an action at law upon the same claim. Here again, however, the chancellor will make his decrees equal to judgments so far as it is in his power to do so; and therefore a decree in chancery against a claim upon its merits will always be a defence to any future suit in chancery upon the same claim, not as destroying the claim or as proving conclusively its invalidity, but as furnishing a sufficient reason why chancery should not again take cognizance of it. Such a decree will also be (what is sometimes called) an equitable defence to any action at law upon the same claim, *i. e.*, the chancellor will enjoin the prosecution of any such action, upon the ground that the plaintiff having elected to make his claim the subject of a suit in equity, and that suit having been defended

¹The phrase "legal effects" is here used as including the effects both at common law and in equity. There is unfortunately no term in common use which exactly covers both. We shall therefore have to speak of the "legal effects at common law" and the "legal effects in equity."

successfully upon the merits, it is not right that the defendant should be vexed again by the same claim."²

If these statements are correct, the doctrine of *res judicata* has no application to the adjudications and decrees of courts of equity. That the doctrine does apply to courts of equity is, however, asserted by other writers in the most unmistakable terms. For example, one writer says:

"A decree in chancery, like a judgment at law, when rendered on the merits, is final and conclusive upon the parties, not only as to facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated."³

The same view is announced by the Supreme Court of the United States in many cases, from one of which we may quote:

"We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance."⁴

This divergence of view seems to be due to the fact that apparently the learned writer first quoted was confining his attention to the English court of equity as it existed down to the time of Lord Eldon or a little later. Even at that time it seems that it was not regarded as a court of record. The old notion of the chancellor as the King's Secretary administering justice for the King, apparently still persisted to that extent. But this view seems not to have been accepted in America after we started on our separate existence, and is certainly not true to-day, for with us the court of chancery is as much a court of record as a court of law.⁵ So soon as this latter view prevailed, the application of the doctrine of *res judicata* to chancery adjudications and decrees was to be expected.

In view of the statements of the writer first quoted, and of the wide currency they have received both because of the eminence of their author and because they are reprinted without annotation in the introductory part of one of the most widely used case-

¹Langdell, Summary of Equity Pleading (2nd ed.) 35, note 4. It seems that the learned writer means to include under the phrase "legal operation" the legal effects both at law and in equity.

²Black, Judgments (2nd ed.) § 517. The same view is expressed in Freeman, Judgments (4th ed.) § 428.

³Pennington v. Gibson (1853) 57 U. S. 65.

⁴Story, Equity Pleading (10th ed. by Gould) § 778, note 5; Thrall v. Waller (1841) 13 Vt. 231.

books upon equity,⁶ it seems worth while to re-examine the matter in the light of the modern cases, with special reference to the American authorities. In doing so we shall have to consider the legal effects of equitable decrees in (1) courts of equity, and (2) courts of law. Incidentally and for the purpose of comparison we shall find it worth while to notice briefly the legal effects in equity of common law judgments.

Let us begin by considering the concrete cases put by the writer first quoted. Take the case where after a hearing on the merits a decree is made against the validity of a claim.⁷ The statement is that the "decree against a claim on its merits will always be a defence to any future suit in chancery upon the same claim, not as destroying the claim or as proving conclusively its invalidity, but as 'furnishing a sufficient reason why chancery should not again take cognizance of it.'" It is also stated by the learned writer that if the plaintiff obtain a decree in his favor, the claim is not merged in the decree in the same way that a claim at law is merged in a judgment. Now it is certainly true to-day in every court of equity that so long as the decree stands unreversed, the same matter can not be litigated again in equity, and as chancery is a court of record, it seems difficult to believe that there can be any difference in the theory applied by the courts of law and equity respectively. In any event, we are not left to speculate about the matter, for our American courts of equity are entirely clear that there is no difference. Hear what a modern court of equity, in a jurisdiction in which a separate court of equity is still maintained, has to say upon the matter: "It is settled that a verdict and judgment of a court of record or a decree in chancery, puts an end to all further controversy concerning the points thus decided between the parties to the suit. . . . If the decree (in favor of the plaintiff) is final, its result is to merge the original cause of action".⁸

⁶Keener, *Cases on Equity Jurisdiction*, 8-9, note.

⁷"The order for dismissing a bill at the hearing is not usually termed, in the books, 'a decree', but merely an 'order of dismissal'; but, to prevent confusion, it is thought best to designate it as 'a decree', to distinguish it from 'an order to dismiss', made upon motion." 2 Daniell, *Chancery Pleading & Practice* (6th Amer. ed.) *933, note 9.

⁸Reed, J., in *Mutual Insurance Co. v. Newton* (1888) 50 N. J. L. 571, 577. Of course if a bill is dismissed for the reason that plaintiff is not entitled to equitable relief, while the decree would be a bar to another equitable suit, it would usually be left open for plaintiff to sue at law, the dismissal being "without prejudice". In some cases a bill may be dismissed without prejudice to the filing of a new bill. 2 Daniell, *Chancery Pleading & Practice* (6th Amer. ed.) *993-994.

The doctrine of *res judicata* is of course much wider than anything we have thus far discussed. For our purposes the following statements by the Supreme Court of the United States are sufficiently accurate:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."⁹

It will be seen that this language does not require the adjudication to be by a court of law. All that is required is that it be a "court of competent jurisdiction". Equity is such a court, and accordingly our modern American cases hold that the doctrine in its full extent does apply to the adjudications of equity.¹⁰

It will also be noticed that these quotations from modern decisions do not say merely that the matter can not be litigated again in equity. They simply say that it can not be litigated again, meaning, apparently, in any court. May we therefore conclude that where a question has been litigated and settled by a court of equity, the matter is *res judicata* not only in equity but at law? And may we reverse the statement and say that if the matter is settled by a law court, the same matter is *res judicata* in equity?¹¹ If the writer first quoted on this question be correct, these questions are to be answered in the negative. If the language of other writers and of modern courts is to be taken at its face value, the answer will be an affirmative one. The matter

⁹Southern Pacific Ry. v. United States (1897) 168 U. S. 1, 48.

¹⁰The current of authorities is so uniform that to cite cases is almost superfluous. Many citations are given in 2 Black, Judgments (2nd ed.) § 517. Good examples are: Chiles v. Champenois (1891) 69 Miss. 603; Preston v. Rickets (1886) 91 Mo. 320; Chouteau v. Gibson (1882) 76 Mo. 38. The latter case is of especial interest. The first equitable adjudication was an equitable counterclaim to a legal action. The decision was adverse to the counterclaim. Later the former defendant as plaintiff brought an equitable action on the same claim. A plea of *res judicata* was allowed. Had the defense in the original action been a legal defense, no such effect would have followed, since Missouri still follows the common law rule that one ejectment does not bar another. See, however, Idalia Co. v. Norman (Mo. 1914) 168 S. W. 749.

¹¹Of course, care must be taken to see that an attempt is being made to litigate the same matter again. Very often it is a different matter that the court of equity is asked to pass upon, and of course plaintiff is entitled to a hearing.

must of course be settled by the decisions in the cases. Let us examine them from this point of view. In *Young v. Farwell*¹² an action at law was brought to recover the reasonable value of services rendered by the plaintiff to the defendant. The defendants answered that the services were rendered under an express contract which had been complied with; also that plaintiff had brought an action against the defendants in the chancery court of Illinois in which a final decree was rendered in favor of the defendants and that the same was a final and conclusive adjudication upon the merits as to the cause of action alleged in the present action. The record of the adjudication of the Illinois court of equity was introduced in evidence, and the New York court found that "as the issue was framed in the Illinois suit, the precise question was presented for determination, and was determined, as was presented in this suit". This being so, the New York court held that the previous adjudication in equity was a bar to litigating the same question at law. The court said:

"It makes no difference that the judgment, or decree, set up by way of estoppel, was one rendered in an equitable action for an accounting; provided that the question involved in this common-law action was involved and determined in the equity action. That a decree rendered in a cause, depending between parties in equity, may be a bar to an action at law between them cannot be questioned. It turns upon the scope of the decree. If the same general question furnished the subject-matter of the controversy—if the material issue was the same in each action—the prior decree must be regarded as conclusive, under the authorities. If the court, which rendered the prior judgment between the parties, had jurisdiction of them and of the subject-matter of their controversy, the principle of its finality is unaffected by the nature of the proceedings which led to the rendition of the judgment. The law of estoppel is equally applicable. A prior judgment, whether rendered in an action at law, or in equity, concludes the parties upon the material issues and is conclusive as to all facts comprehended within the issues submitted, which were relevant and material and which were so related to the issues that their determination was necessarily involved."

Another case from the same jurisdiction presented the following state of facts: In the previous equitable action a municipal corporation, the present defendant in the court of law, had sought to obtain the cancellation of certain bonds as invalid. The only issue presented and tried was that of the validity of the bonds

¹²(1901) 165 N. Y. 341.

and the court of equity adjudged the bonds valid. One of the holders now sued the municipal corporation on some of the bonds, and the defense was the alleged invalidity. The court of law held that this matter was *res judicata* and could not be litigated again. The court said: "It is of no consequence that the judgment was in equity. . . . The town has had its day in court, a full opportunity to assail and test the bonds, a patient hearing and direct decision upon all the questions now raised. It would be hard to find a case to which the doctrine of *res adjudicata* could more justly and clearly apply than this."¹³

So clear and unanimous are the modern cases upon this point that it is not worth while to give other examples at length. A few are cited in the footnote.¹⁴ A brief search of the digest will reveal many more. In view of these authorities, what shall we say of the dictum of the Supreme Court of the United States in *Hart v. Sansom*¹⁵ that "upon a bill for the removal of a cloud upon title, . . . the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff." The learned judge who wrote this opinion refers for authority to the book in which is found the quotation given above, denying legal effects to equitable decrees, citing the very section containing the words above quoted. If this statement of the learned judge in *Hart v. Sansom* means anything, it means that the determination of the legal title would not be *res judicata* at law because of the adjudication in equity. Fortunately this was merely a dictum and not a part of the decision, and it is shown to be erroneous by numerous decisions to the contrary.¹⁶ Is it not time for judges and writers to stop talking language suitable to the time of Coke in discussing the power of equity,

¹³*United States Bank v. Town of Solon* (1893) 136 N. Y. 465, 480.

¹⁴*Coit v. Tracy* (1830) 8 Conn. 268; *People v. Rickert* (1896) 159 Ill. 496; *Foster v. Busted* (1868) 100 Mass. 409, (semble); *Powers v. Chelsea Savings Bank* (1880) 129 Mass. 44; *Winans v. Dunham* (N. Y. 1830) 5 Wend. 47; *Bradley v. German-American Insurance Co.* (1898) 147 Mo. 639; *Hopkins v. Lee* (1821) 19 U. S. 109, (semble). See also *Freeman, Judgments* (4th ed.) § 428, and cases cited.

¹⁵(1884) 110 U. S. 151.

¹⁶For examples, see: *Peoples' Bank v. Eberts* (1893) 96 Mich. 396; *State v. Boller* (C. C. 1889) 47 Fed. 415; *Van Fleet, Former Adjudication*, § 314 *et seq.*

and to recognize that a court of equity is a legal tribunal with power to adjudicate and settle controversies as finally as a court of law?

It should, of course, be equally true that when a matter has been adjudicated by a court of law, it is *res judicata* in equity. The authorities on this are equally uniform and emphatic, as was to be expected, since the rule merely requires that the matter be settled by a court of competent jurisdiction.¹⁷

It follows from this broad doctrine followed by modern courts that if a debt be sued for in chancery, as it frequently may be, not only is the original cause of action merged in the decree, so that it can not be sued on again in equity, but it is also so merged in the decree that it can not be sued on again at law. For example, in *Mutual Fire Insurance Co. v. Newton*,¹⁸ an action was brought for the balance due on a bond after foreclosure proceedings had been had on the mortgage given to secure the bond. The defendant pleaded that the sum sued for was the amount of a deficiency declared and decreed by the Court of Chancery as still due and owing upon the bond after the foreclosure; and that a deficiency decree of the Court of Chancery for its payment was duly rendered. This was held a good plea, on the ground that "when the plaintiff invoked the Court of Chancery to give him the statutory decree for deficiency, and he obtained it, his right to bring a new suit on the bond was gone." Of course decisions of this kind must be put into their proper setting; that is, we must remember that in New Jersey, as in most of the other States, the plaintiff was entitled to execution on his decree as though it were a judgment.¹⁹

So much for the question of the legal effects of equitable decrees in making a question *res judicata*, at law and in equity. It may, however, be argued that there is a difference between judgment at law and decree in equity for money, in that the former creates a new right—the debt of record—while the decree does nothing more than entitle the holder of it to the appropriate procedure for its enforcement which we have described at length in Part II. Indeed, the learned writer quoted above expressly

¹⁷The cases are cited in 2 Black, Judgments, (2nd ed.) § 518, note 73; also in Freeman, Judgments (4th ed.) § 248, note 5.

¹⁸(1888) 50 N. J. L. 571.

¹⁹We must be very careful, in applying this doctrine, to be sure that there was really only one cause of action which could be enforced in either tribunal, as in the case put.

asserts that this difference exists. He says that the common law judgment, among other effects, "creates a new debt of a higher nature", but that "if the same debt be sued for in the court of chancery, (as it frequently may be), and a decree obtained for its payment, not one of the effects before stated is produced by the decree". If the decree has any effect of a kind comparable to that of the common law judgment in creating a debt of a higher nature, there are of course two possibilities: (1) that it creates a common law debt, *i. e.*, such a legal effect is attached to it by the common law; (2) that the decree creates an "equitable debt" of a higher nature. Before examining the cases, let us note that a judgment of one jurisdiction is by the common law of other jurisdictions recognized as creating a debt in these other jurisdictions; or, more accurately, the common law of one jurisdiction gives to the judgment of the court of the other jurisdiction the legal effect stated.²⁰ The question at once arises: Does either equity or the common law give to decrees for money rendered by foreign courts of equity a similar effect? With reference to an equitable decree for money, therefore, we have the following questions to answer: (1) Does an equitable decree for money create in the same jurisdiction a new obligation of some kind, and if so, is it an "equitable debt of record", *i. e.* an equitable obligation based upon the record of a court of equity; or is it a common law debt? (2) Can a decree for money be sued on in another jurisdiction, either as an equitable or a legal cause of action? While these questions are distinct, and one might be answered in the negative without affecting the answer to the other, it is convenient in dealing with the cases to consider them in connection with each other.

There seem to be no cases in which an attempt was made to assert that a domestic decree in equity for the payment of money gives rise in equity to a new cause of action based upon the decree, at least where there are no difficulties in the way of enforcing the original decree. Apparently there was no reason for doing this, as no advantage could thus be gained. At common law, execution had to be issued within a year and a day or the right to it was lost. Originally in the personal actions the judgment could not be brought to life again by *scire facias*, which,

²⁰Whether such an effect is given to foreign judgments is purely a question of positive law. In the Civil Law, no such effect is attached to foreign judgments. 3 Beale, Cases on Conflict of Laws, 537.

until the Statute of Westminster II, apparently applied only to the "real actions". The only remedy in the personal actions was to bring a new action of debt on the record and obtain a new judgment. In chancery, however, it seems there was no such time limitation for the enforcement of decrees, and ordinarily, therefore, no new equitable action was necessary. Sometimes, however, it did become necessary, or at least convenient, because of things which had happened since the decree was made, to permit an equitable action to enforce a decree, and when this was so, a bill would lie for the enforcement of the decree.²¹ The foundation of such a bill is the decree and not the original equitable cause of action, and it should follow that on such a bill the merits of the original controversy could not be gone into. In spite of some confusion in the cases (based chiefly upon dicta, and perhaps one or two decisions of individual chancellors) this seems to have been the prevailing view.²² The question at once arises: If the original decree is obtained by fraud, can it, unless it be attacked by a bill to set it aside, be enforced by a bill to obtain a new decree; or can the defendant set up the fraud as a defence in his answer to the bill? If as suggested here there is a real analogy between judgment and decree, one would expect that, just as fraud in obtaining a domestic judgment is no defence to its enforcement, but the attack must be by a bill in equity filed for that purpose, so here fraud will be, not a defence, but the basis of a bill or cross-bill. While the authorities dealing with this question are not numerous, (doubtless because bills to enforce decrees are themselves uncommon), they are substantially unanimous in holding that the fraud in obtaining the decree can not be used as a defense to a bill to carry the decree into execution. They accordingly hold that if the decree is to be attacked for the fraud in obtaining it, it must be by bill filed for that purpose. An example of this is found in *Caldwell v. Giles*,²³ in which an administrator had filed a bill to obtain satisfaction of a decree for the payment of a sum of money, formerly obtained in the same court by the intestate against the defendant. Defendant in his answer set up that the original decree was obtained by the

²¹Mitford, Pleadings in Chancery (5th ed.) 95; Adams, Equity (4th Amer. ed.) 826.

²²Minshull v. Lord Mohun (1711) 2 Vern. Ch. 672; s. c., on appeal, 6 Bro. P. C. 32. The cases are collected in Mitford, *loc. cit.*

²³(S. C. 1837) 2 Hill, Eq., 548. On the general subject see Mitford, *loc. cit.*; Adams, Equity (4th Amer. ed.) 833; *Carneal v. Wilson* (1823) 13 Ky. *80; *Edmondson v. Moseby* (1830) 27 Ky. *497, 501.

intestate by fraud, by inducing witnesses to testify falsely. The chancellor held as follows: "There is no question, but that if a decree be obtained by fraud, it may be set aside on an original bill for that purpose. The only question is, whether the defendant can avail himself of this by his answer, so as to resist the performance of the decree. I am of opinion that he cannot." Accordingly, a decree for plaintiff was entered. On appeal, the higher court affirmed the chancellor's decision, saying that the matter raised by the defendant could be gone into "only on a bill to set aside the decree for the fraud complained of, and that course of proceeding is the only one recognized by the precedents". There are some dicta and perhaps decisions to the contrary, but it is suggested by Mitford that these are cases where the decree was not signed and enrolled.²⁴ Some of the cases can not be accounted for on that basis, but they are cases in which the new decree was sought by others than the original plaintiff, *e. g.*, creditors, assignees, etc., and the court stated that while ordinarily the rule was that the justice of the original decree could not be gone into on a bill to execute it, in these cases it could.²⁵ A failure to keep this difference in mind has led to much of the confusion, and doubtless to some real conflict of authority. In any event, "where a decree is capable of being executed by the ordinary process and forms of the Court, whatever the iniquity of the decree may be, yet, till it is reversed, the Court is bound to assist it with the utmost process the course of the Court will bear".²⁶ In other words: until set aside when directly attacked in the proper way, the decree, even though fraudulently obtained, gives the plaintiff the right to demand of the court and its officers all the usual remedies for its enforcement, including a new decree in a proper case.

Returning now to the decree for the payment of money: although it did not ordinarily give rise to a new cause of action in equity for the reasons stated above, the question remains, did it not form the basis of a common law action of debt? This question was raised in *Carpenter v. Thornton*,²⁷ in which an

²⁴Mitford, *loc. cit.*, note *a*.

²⁵As in *West v. Skip* (1749) 1 Ves. 239.

²⁶1 Daniell, Chancery Practice (1st ed.) 194.

²⁷(1819) 3 B. & Ald. 52. A brief but valuable discussion of the principles upon which legal actions upon equitable decrees for money may be based is given by Professor Hohfeld in 11 Michigan Law Rev. 568. See also: Black, Judgments (2nd ed.) § 869; Freeman, Judgments (4th ed.) § 434.

action of assumpsit was brought on a domestic decree for the payment of a sum of money, which had not been complied with. The original cause of action was purely equitable. It was held that no action would lie, but the judges differed in the reasons given for the decision. Abbott, C. J., thought that if the decree had been based upon a cause of action which might have been sued on at law, as would often be the case, "a court of law might, perhaps, lend its aid to enforce such a decree". As it was, he concluded there was no "implied contract". His opinion is not helpful, for it fails to distinguish between an assumpsit on an actual contract implied in fact and a "contract implied in law" or quasi-contract. The other judges gave various reasons, nearly all really begging the question by assuming that the decree did not give rise to a common law debt. If it did not, then of course there was no "promise implied in law" to pay it. All emphasized the form of the decree as a mere "order to pay the money" and Holroyd, J., added: "The mode of enforcing such an order is by attachment, for contempt in not obeying the order of the court." How incomplete this statement is we have already seen in Part II. The inadequacy of the reasons given to account for the decision appears clearly in the subsequent case of *Henley v. Soper*,²⁸ in which an action of debt was brought on the decree of a colonial court of equity. This decree was for the payment of a sum of money found by the court of equity to be due from one partner to another after the court had had the proper account taken. The court held unanimously that debt would lie on such a decree. Apparently some of the judges seemed to think, and other courts later have had the same idea, that the colonial court of equity was enforcing by its decree a legal and not an equitable duty to account. Inasmuch as no action of debt would lie by one partner against the other unless an account had been stated between the parties; and as there was no common law action to compel an accounting in such a case,²⁹ but the only remedy was by a bill in equity, it would seem that the decree was based upon an equitable and not upon a legal duty

²⁸(1828) 8 B. & C. 16.

²⁹It seems that the common law action of account did not cover partners. To-day some courts doubtless permit an action at law where the account is a very simple one. The same thing has been allowed where the relation was purely equitable, as in the case of trustees where the sole remaining duty was to pay over a sum of money.

to account.³⁰ The real effect of the decision therefore is to permit an action of debt at law on the decree of the foreign court of equity, that decree being based upon an equitable and not upon a legal cause of action. It is worthy of notice that much is said in the opinions which is not in harmony with the opinions in *Carpenter v. Thornton*. Lord Tenterden, C. J., for example, says: "There is a great difference between the decree of a colonial court of equity and of a court of equity of this country. The colonial court of equity can not enforce its decrees here, a court of equity in this country may; and, therefore, in the latter case there is no occasion for the interference of a court of law, in the former there is, to prevent a failure of justice." This makes the decision in the first case depend not upon the fundamental characteristics of a decree as a merely personal order to pay, but upon the lack of necessity for a legal action. As a matter of fact, though the necessity for resorting to an English court appears in the case of a foreign decree, it by no means follows that it should be an English court of law. Why not ask the English court of equity to recognize the foreign decree as creating, according to English chancery law, a cause of action in equity, entitling the plaintiff to a new decree in England? Apparently this idea never presented itself to anyone concerned, yet this very thing was tried and seemingly with success many years before in *Morgan's Case*.³¹ That case, however, seems not to have been known to the parties or the court in the principal case. We must also note that the learned judge went on to distinguish the principal case from *Carpenter v. Thornton*, on the ground that in *Carpenter v. Thornton* the matter was one of purely equitable jurisdiction, while here if an account were stated a court of law would deal with the matter. As already stated, this seems to involve some confusion of thought. The fact that a common law duty would arise if an account were stated, does not show that one exists before that time. Bayley, J., put the allowance of the action in this case upon much the same ground. He argued that since an action at law would lie on an account stated by the parties, "it cannot make any difference that the balance in the present case was settled by the Court instead of by the parties

³⁰It may also be noted in passing that an action on account stated will lie where the statement is made because of a purely equitable relationship, as in the case of a trustee and cestui que trust.

³¹(1737) 1 Atk. 408.

themselves out of Court". This is a sensible conclusion, but it must be noted that it is the decree of the colonial court that gives rise to the debt, for until the court has ascertained finally the balance due, there is no common law debt or duty to pay the money. Apparently Bayley, J., if he followed his logic out to its legitimate consequences, would permit an action of debt on a domestic decree founded upon a relationship of this kind. Holroyd, J., concurred on the ground that an action of debt would lie "upon the decree of a foreign court of equity if duly perfected". Apparently he would not limit the doctrine to the case of decrees based upon common law relationships.

With the English authorities in this condition, it was to be expected that there would be confusion and conflict in the American decisions. As a matter of fact, there is very little, at least in the modern cases. In discussing them, we must keep in mind the statutory innovations which were being introduced during the last century, permitting execution as at common law on equitable decrees, abolishing imprisonment for debt, etc., as described in Part II. It was to be expected that these changes would influence considerably the views of the American courts upon the question we are considering. Attention may again be directed in passing to the fact that apparently, even at the date of the case just referred to, the English Court of Chancery was not yet looked at by the common law as a court of record, a view not followed in America. This difference also must be taken into account in considering the American cases. Curiously enough the question of suing at law on a foreign decree was raised in America some years before the decision in the English cases just discussed. In 1805 the Supreme Court of New York was asked to pass upon the question in the case of *Post v. Neafie*.³² A decree for the payment of money by defendant to the plaintiff had been made by the Chancery Court of New Jersey. An action of debt was brought in a New York court on this decree. Under the New Jersey statute of 1799, referred to in Part II of this article, common law execution could be issued to enforce decrees in New Jersey, and this undoubtedly influenced the decision somewhat. Counsel for the plaintiff argued, among other things, that the New Jersey Court of Chancery was a court of record, even if the English chancery court was not, and that therefore the action would lie. A majority of the court, (Kent,

³²(N. Y. 1805) 3 Caines, 22.

C. J., and another judge dissenting), held the action would lie. They admitted that there was no precedent for such an action. A portion of the opinion of Livingston, J., is worth quoting:—

“Debt, it is said, will not lie on the decree of a court of equity. In examining this point, I shall take it for granted, as is truly the case, that this decree is for the payment of money *only*. A mere equity, it is alleged, is no ground of relief at common law, and that the objects of equitable and legal jurisdiction, being so very different, it is impossible the former can be enforced by the tribunals of the latter. This may be correct in the first instance; but after the original ground of complaint has been litigated and *determined* in chancery, why should not its decree or judgment, if for the payment of money, be the ground of an action at law, as well as the judgment of any other court? That we have no precedent of this kind is easily accounted for. Decrees in equity are more generally for the performance of certain acts, to which common law courts cannot compel obedience, and therefore the successful party can, in such cases, obtain execution, only out of the same court.”

As stated, Kent, C. J., dissented, chiefly on the ground that no precedent for the action could be found, arguing that “the reason why courts of law would not take cognizance of decrees, is . . . to be deduced from the history and peculiar jurisdiction of the court of chancery; and although the reason of the rule may not now be applicable to some of its decrees, yet we are not at liberty at this day to set aside the rule”. He concluded by suggesting that an action could be brought on the decree in the New York court of chancery, citing *Morgan’s case*, mentioned above.³³

While the decision in *Post v. Neafie* undoubtedly had a large influence upon later decisions, the development which it started was inevitable if the same manner of execution was to be used for common law judgment and decree in equity. Consequently, ever since *Post v. Neafie* the line of authorities permitting an action at law on a foreign decree for the payment of money, where the decree is final and absolute, is practically unbroken. In 1823 the question arose in Pennsylvania, and the only authority in favor of the action that was cited was *Post v. Neafie*. The Pennsylvania court followed the New York court, saying: “It

³³Another reason given by Kent, C. J., was that as the New Jersey decree was merely *prima facie* evidence of the truth of the facts, etc., the New York court of law might have to go into the equitable cause of action itself. As the Supreme Court of the United States later decided, the New Jersey decree was conclusive, and so this objection was not sound. See comment on Kent’s opinion in *Pennington v. Gibson* (1853) 57 U. S. 65, 69-70.

is a general principle, that where a man is under an obligation to pay a *certain sum of money*, whether that obligation is founded on a contract, or the judgment of a court, an action of debt lies. On that principle, we support actions of debt on *foreign* judgments. And I confess, I see no reason why a decree in chancery, is not as strong as a foreign judgment."³⁴ A few of the many authorities are cited in the footnote.³⁵ In some, emphasis is placed upon the fact that, by the statutes of the State in which the decree was rendered, the decree is given the effect of a judgment at law. As this legislation is found almost everywhere, this limitation amounts to very little, even if it be accepted. No modern decision refusing the action at law on a foreign decree because of the absence of such legislation has come to the notice of the present writer, and many of the decisions make no mention of such a limitation. It may perhaps safely be concluded that such a limitation does not exist, at least in most jurisdictions. In the case of decrees for alimony, the action is sometimes denied because the particular decree is not final and absolute.³⁶

The case of an action at law based on the decree of the court of chancery of the same jurisdiction has given the American courts little difficulty. Such actions are of course very rare, for as common law execution may now be had on decrees in most jurisdictions, little is to be gained by the action at law. In *Thrall v. Waller*,³⁷ an action of debt was brought on such a decree, and was allowed. Redfield, J., pointed out that the decree was based upon a partnership accounting, the very case in which, it was suggested by the dicta in *Carpenter v. Thornton*, a court of law might allow the action. No authority allowing the action was cited, however, and only the cases discussed above were mentioned. As a matter of fact many years before, in 1818, the Supreme Court of Massachusetts had permitted an action of debt on a decree for payment of alimony entered by a Massachusetts court. The court said: "The debt is certain, and it is proved by record; and the decree is, in effect, as much a judg-

³⁴*Evans v. Tatem* (Pa. 1823) 9 S. & R. 252.

³⁵*Tompkins v. Cooper* (1895) 97 Ga. 631; *Warren v. McCarthy* (1860) 25 Ill. 83; *Williams v. Preston* (1830) 26 Ky. 600; *McKim v. Odom* (1835) 12 Me. 94; *Davis v. Lipschitz* (1902) 96 Mo. App. 587; *Kunze v. Kunze* (1896) 94 Wis. 54; *De Longe v. Fishback* (1913) 153 Wis. 193; *Pennington v. Gibson* (1853) 57 U. S. 65.

³⁶See cases in 54 L. R. A. 204; 65 L. R. A. 816, and references there given.

³⁷(1841) 13 Vt. 231.

ment as if rendered on the common law side of the Court."³⁸ The case of *Hugh v. Higgs*³⁹ is often cited as a holding to the contrary, but it seems that it is not, as it held that an action at law would not lie upon the "decretal order" of the chancery court, which of course is entirely sound, as a "decretal order" settles nothing finally. There is, however, a dictum in the case denying that an action at law would lie on a decree, but apparently the matter had not been carefully considered. As stated, cases actually involving the question rarely arise, but when they do the decision is nearly always in favor of the action. There are also almost innumerable dicta in favor of allowing the action, the most notable and emphatic being that in *Pennington v. Gibson*:⁴⁰ "We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other."⁴¹

If the decree be not for the payment of money, but for the doing of some other act, such as to convey land, we have seen above that as a rule no new action in equity may be brought upon it in the same jurisdiction, apparently for the reason that there is no necessity for permitting it. Wherever there is need, a "bill to execute the decree" is allowed, as we have seen. There remains the question: Can an action, either at law or in equity, be brought upon a foreign decree which is for the doing of anything except the payment of money? Although there is no reason why such actions should not be allowed, if any necessity for them exists, it seems to be supposed by some writers that our system makes no provision for them. One writer says:

"An equitable decree for the doing of an act, except the mere payment of money, is not by our law enforceable in another court, even of the same State; there is no form of proceeding for enforcing the merely personal decree of a court of equity, except by order

³⁸*Howard v. Howard* (1818) 15 Mass. 196.

³⁹(1823) 21 U. S. 697.

⁴⁰(1853) 57 U. S. 65.

⁴¹*Ames v. Hoy* (1859) 12 Cal. 11; *Blattner v. Frost* (1892) 44 Ill. App. 580; *McKim v. Odom* (1835) 12 Me. 94, (semble). The case of *Richardson v. Jones* (Md. 1831) 3 Gill & J. 163, often cited as *contra*, contains only the merest obiter dictum on the question.

of the court rendering it. It is therefore impossible to enforce a foreign decree that an act be done by the defendant, such as making a conveyance, either by decreeing the conveyance without judicial investigation or by regarding it as made. An additional objection to enforcing such a decree is that it is not in its nature the establishment of an obligation, but rather a method of enforcing an obligation, a form of execution."⁴²

Other writers, however, express a contrary view.⁴³ As a matter of fact, the truth seems to lie somewhere between the two statements, *i. e.*, such equitable actions in other jurisdictions may be brought on some though not on all decrees. Looking at the matter aside from authority, is there anything inherent in the nature of a decree of a court of equity for the doing of an act—say the execution of a deed conveying land—which prevents a court of equity in another jurisdiction from holding it to be the equity law of that jurisdiction that the decree of the foreign chancellor gives rise to an equitable cause of action on which a bill for specific performance may be filed? It seems not. An order to pay money and an order to convey land are both in the same form, and one seems to be no more a "merely personal decree" than the other. It is therefore purely a question of positive law whether our system of law has given such legal consequences in equity to foreign decrees for the doing of acts. It seems that in some cases it has and in others it has not. In the case of a decree ordering the conveyance of land, if the decree be entered by the court of equity of the jurisdiction within whose limits the land is situated, there is usually no need to-day for any such relief, as the court may itself vest the title in the plaintiff, if defendant does not comply with the decree. Consequently we must not expect to find many cases in the books. Wherever such relief is necessary, however, it seems to be the law, as far as authorities can be found, that if the decree for the conveyance of land is based upon a contract, express trust, or other consensual relationship of the parties which gives rise, independently of the decree, to equitable interests for the enforcement of which the decree is entered, a bill in equity will lie in other jurisdictions upon the decree itself, if it has not been obeyed, as a substantive cause of action. For example, in *Roblin v. Long*,⁴⁴ defendant had been ordered by the Chancery

⁴³ Beale, *Cases on Conflict of Laws*, 537.

⁴² Black, *Judgments* (2nd ed.) § 872; Hohfeld, 11 *Michigan Law Rev.* 551. See also the remarks of Holmes, J., in *Fall v. Eastin* (1909) 215 U. S. 1, 14.

⁴⁴ (N. Y. 1880) 60 How. Pr. 200.

Court of the Province of Ontario, Canada, to convey to the plaintiff land situated in Ontario. He did not obey and went to New York. An equitable action was brought in New York, the decree and not the original contract being sued on as the cause of action, and a new decree for conveyance was sought. The relief asked for was given, the court assuming that of course the plaintiff was entitled to a new decree. The same result was reached in the Michigan case of *Dunlap v. Byers*,⁴⁵ although the decree of the Ohio court was for the conveyance of land in Michigan. The instances of such relief are not numerous, probably for the reason suggested above. The principle has, however, often received extra-judicial approval.⁴⁶ The case of *Burnley v. Stevenson*, cited in the last note, goes indeed much farther than the other cases, by holding that when the defendant, who has disobeyed the foreign chancellor's decree ordering a conveyance of land, brings an ejectment, in the State where the land is, against the previous plaintiff in equity (now defendant at law) the latter may plead the foreign decree as an "equitable defence" under the code of civil procedure. The result of this holding seems to be that the legal effect of the foreign decree and of possession together is to pass legal title, *i. e.*, defendant is in possession and no one has the right or power to disturb him. This is doubtless an extreme view and it would seem better to compel the defendant to plead the foreign decree as an equitable counterclaim, asking for specific performance by way of a new decree.

The case cited to support the proposition that decrees in equity for the conveyance of land are not recognized as having in other jurisdictions the effects stated, is *Bullock v. Bullock*.⁴⁷ In that

⁴⁵(1896) 110 Mich. 109.

⁴⁶*Fletcher v. Ferrel* (1840) 39 Ky. *372, (personal property; relief denied for other reasons); *Burnley v. Stevenson* (1873) 2 Ohio St. 474; *Vaught v. Meador* (1901) 99 Va. 569.

⁴⁷(1894) 52 N. J. Eq. 561. The New Jersey court in its opinion gives an argument much like that quoted in the text from Prof. Beale's Summary. If we adopt that view, the result is that in New Jersey, after a decree in New York for specific performance of a contract to convey New Jersey land, a bill must be filed for specific performance of the original contract. At the trial, however, it seems that the determination of the New York Court that the contract was made, etc., could be introduced as "conclusive evidence" of the contract, so that there would be no new investigation into that. The difference between Prof. Beale's view and that urged here would thus be merely a technical one. A question not discussed here is the effect of the full faith and credit clause of the Constitution in requiring States to permit suits on equitable decrees. To discuss that is beyond the scope of this article. The contention is merely that States have permitted such actions on foreign decrees, and that to do so is sound.

case a New York court of equity, after entering a decree of divorce and decreeing alimony, ordered the defendant to execute, by way of security for the payment of the alimony, a mortgage on New Jersey land. He did not do so and this action was brought in the New Jersey chancery court for specific performance of the New York decree. Relief was denied. The chief objection of the court seemed to be based upon the fact that the New York court was attempting by its decree to *create* and not merely to enforce an equitable interest in New Jersey land, there being in existence prior to the decree no such equitable interest. The reasons for and against the view that a New York court has no jurisdiction, *i. e.*, power, to do a thing of this kind have already been set forth in Part II.⁴⁸ and need not be repeated here. Probably the view taken by the New Jersey court would be followed by most if not all courts. Even so, the decision has as a decision no bearing upon a case in which all courts recognize that the court of the other State has jurisdiction to make a decree which will be recognized everywhere as binding, *viz.*, where specific enforcement is asked of equitable interests created by the agreements of the parties themselves.⁴⁹

We are now perhaps ready to consider the truth of the statements which stand as quotations at the opening of this series of articles: "A decree does not bind the right, but only the person to obedience"; "A decree there binds the person to obedience, but does not at all operate upon the matter in question". These statements were made centuries ago. Are they still a part of the law which determines the relations of courts of law and equity to each other? Has there been no evolution? Let us consider cases like that in connection with which these statements were made. A bond is obtained by fraud,⁴⁹ or there was to be a consideration which has failed. At common law there was no defense to such an instrument. The chancellor however would enjoin suit upon the instrument and order it delivered up to be cancelled. This was

⁴⁸15 Columbia Law Rev. 128-129.

⁴⁹It seems to be recognized that a court of equity may enforce a constructive trust growing out of acts of the parties themselves, even though the land is not in the jurisdiction. *Butterfield v. Butterfield* (1905) 9 Ariz. 212. If so, the decree in such a case ought to furnish the basis of a cause of action in another jurisdiction, as in the case of express trusts. No case raising this question has come to the writer's attention.

⁴⁹It is assumed that the one executing the bond knew the character of the instrument he was executing. If he was deceived as to that, it is not his bond, and that may be shown at law under the proper plea.

done in the case in question.⁵⁰ Defendant refused to surrender the bond and went to jail for contempt. In the Common Bench, the defendant in equity, as plaintiff, sued on the bond. It was held that the chancery decree was no defense to the action at law. This was in 1459. Is this still the law? Many writers would have us believe that it is. Let us put the case concretely as it might come up to-day. In the federal courts, it is still the law that fraud does not invalidate a sealed obligation in a court of law.⁵¹ Mr. Justice X, sitting as a chancery judge, finds that a bond, or a release of a legal cause of action, was obtained by fraud. He orders the instrument delivered up to be cancelled. Defendant refuses to do so and goes to jail. Defendant instructs his attorney to proceed with the suit on the bond. Would Mr. Justice X, sitting as a common law judge, hold that the bond was still a valid subsisting common law cause of action, so that further equitable relief would be necessary to prevent a recovery; or would he permit the chancery decree to be set up as a defense to the common law action? If it were the case of a release obtained by fraud, would he hold it still a valid release and so a defense to the common law action, or would he hold that the legal effect of his decree as chancellor was to destroy the legal validity of the release and thus to reinstate the common law cause of action?⁵²

It is perhaps worthy of note that in Professor Ames's collection of cases on equity, no modern cases following the case of *J. R. v. M. P.* are cited. Let us see what we can find. In *Dobson v. Pearce*⁵³ a money judgment at law was obtained in New York. An action of debt was later brought on the New York judgment in a Connecticut court. Thereupon the defendant began a chancery action in Connecticut, alleging fraud in the procuring of the New York judgment. This action in equity resulted in a decree of the Connecticut court of equity declaring that the judgment was

⁵⁰*J. R. v. M. P.* (1459) Y. B. 37 Hen. VI. fol. 13, pl. 3; s. c. Jenk, Cent. Cas. 108, pl. 9.

⁵¹*Vandervelden v. Railway Co.* (C. C. 1894) 61 Fed. 54; *Heck v. Missouri Pacific Ry.* (C. C. 1906) 147 Fed. 775; *Pacific Mutual Life Ins. Co. v. Webb* (C. C. A. 1907) 157 Fed. 155. The authorities are collected in the opinion in the last case.

⁵²Under the new part of Rule 8 of the New Federal Equity Rules, presumably in proper cases the judge would not hesitate to appoint someone to execute a release of the bond in the name of the defendant. Doubtless such a formality would satisfy everyone. The power to do this is not given by statute, however, but only by rule of court; and the rule suggested in the next paragraph of the text is merely a simpler way to do the same thing.

⁵³(1854) 12 N. Y. 156.

fraudulently obtained, and perpetually enjoining the prosecution of the action at law. Later this action was brought in New York on the original New York judgment, on the theory that the Connecticut decree in equity did not "operate on the matter in question", *i. e.*, did not affect the validity of the judgment. The New York court held, however, that the Connecticut decree could be set up as a defence to the action at law.⁵⁴ If this decision be correct, the result would have been the same if the decree had been made by a New York court of equity. This decision of course was based upon, or at least influenced by, the provisions of the New York Code of Civil Procedure. The effect of it is to give to the adjudication of the court of equity the legal effect of destroying the common law debt based on the judgment. This would not have been true had defendant been required to set the decree up as an equitable counterclaim. Presumably the court which decided *Dobson v. Pearce* would hold that execution could not be had on the original judgment, *i. e.*, that the legal effect of the decree was to discharge the judgment or at least the right to execution. To hold otherwise would be inconsistent. The same court would be bound to hold, if fraud were not a defense to an action at law on a specialty, that a decree in equity ordering surrender of the bond for cancellation and perpetually enjoining suit upon it, constituted a valid defence at law to a suit based upon it. While, as stated, the result in *Dobson v. Pearce* was influenced by the Code of Civil Procedure, is it not a result that should be reached to-day by all courts? It is a change in substantive law, and in fact the Code contained no authority for it. It has the merit of preserving the advantages of the old system, *viz.*, that principles of equity as to fraud, failure of consideration, etc., are to be administered by the chancellor, which to-day means in most States merely judge without jury, as distinguished from judge with jury. On the other hand, under a modern system of procedure which allows the equitable action for cancellation to be brought by way of counterclaim to the law action, it obtains all the real advantages, without the disadvantages, of supposed simplifications which make the fraud, etc., legal defenses, and thus

⁵⁴The opinion of the court is not as clear as it might be upon the point whether the *decree* has the effect stated, or the fraud has that effect and the decree conclusively establishes the fact of fraud. However, it is not believed that there is any well-considered authority holding that the fraud itself can be set up as a mere defense to an action on a judgment, so that it seems clear the decision has the effect of establishing the rule stated in the text.

compel principles of equity to be administered by a common law tribunal, *i. e.*, by a judge and jury. Such a tribunal is often not adapted to deal effectively either with equitable principles or the kind of facts involved in these controversies; and its decisions are subject to a different kind of appellate review. Would it really be a startling thing if Mr. Justice X, sitting in the federal court of common law, should, even without the aid of a code of civil procedure, rule in accordance with *Dobson v. Pearce*? There are apparently no modern precedents to prevent his doing so. As matters are, where in a suit at law in a federal court fraud was set up as matter in confession and avoidance of a release under seal, the court held that while the fraud did not at law in the federal courts have that effect, "if the plaintiff [the one setting up the fraud] so desires, the trial of the law action may be postponed, with leave to the plaintiff to file a bill in equity for the purpose of attacking and testing the validity" of the release.⁵⁵ That is, sitting in a common law suit, the judge dispensed for the time being with the necessity for a temporary injunction to stay the proceeding at law.⁵⁶ If in the equity proceeding he finds the fraud as alleged and orders cancellation, but does not succeed in getting hold of the physical instrument, shall he refuse in the common law proceeding to give a common sense effect to his adjudication in the equity proceeding?⁵⁷

The well-known case of *Platt v. Woodruff*⁵⁸ may be supposed to be in conflict with the principle here suggested. In that case an action was brought at law on a negotiable instrument. Certain defenses were set up. The defendant in the law suit then began in another court an action in equity for cancellation of the instrument, asking a temporary injunction. The grounds for relief were substantially the facts relied on in the law suit as a defence.

⁵⁵*Vandervelden v. Railway Co.* (C. C. 1894) 61 Fed. 54.

⁵⁶This, of course, is always the effect in a similar case of an equitable counterclaim under code procedure. It acts automatically to stop the action at law until the counterclaim has been disposed of.

⁵⁷The case of *Burnley v. Stevenson* (1873) 24 Oh. St. 474, discussed above in the text, is another case decision following the principle of *Dobson v. Pearce*. The equitable decree for conveyance was there allowed not as an equitable counterclaim but as a *defense* to an ejectment. This gives to the decree the effect of depriving the plaintiff at law of his right to recover possession; and so of his legal title. Other cases which at least indicate the probability that *Dobson v. Pearce* would be followed are: *Chouteau v. Gibson* (1882) 76 Mo. 38; *Preston v. Rickets* (1886) 91 Mo. 320; *Sampson v. Mitchell* (1894) 125 Mo. 217.

⁵⁸(1875) 61 N. Y. 378.

A temporary injunction was granted and later vacated as irregularly granted. Later another temporary injunction was obtained from another judge restraining the plaintiff at law from prosecuting his suit. The plaintiff at law disobeyed the injunction, and after a trial obtained a judgment. Later the second temporary injunction was vacated as irregularly granted. The action in equity now came on for a hearing. A referee held the judgment at law void. This was correctly held erroneous. When the judgment was entered, there was no final decree in the case, purporting to be based upon a determination of the rights of the parties. The temporary injunction could therefore be nothing more than an order personally binding the party enjoined. It did not divest the common law court of jurisdiction, *i. e.*, power to act and enter a judgment. Further, it was not called to the attention of the common law court in any way. The common law court, having jurisdiction, heard the case and entered judgment. On the principles set forth above concerning the doctrine of *res judicata*, if the facts alleged as a defence at law were the same facts that formed the basis of the equitable action for cancellation, as might well be the case, the adjudication at law settled the matter and the plaintiff in the equitable action could not litigate it again.⁵⁹ Let us note also that it is not contended that the decree of the court of equity in *Dobson v. Pearce* deprived the court of law of any jurisdiction, *i. e.*, power to act. If the principle contended for here should be adopted, it would not follow that a judgment of a trial court refusing to recognize the decree as having the legal effect suggested would be void. It would most certainly be valid and binding until reversed, though erroneous and liable to be reversed by an appellate tribunal which accepted the principle of *Dobson v. Pearce*. It would merely be the case of a court having jurisdiction making an error as to the law to be applied to the state of facts before it. From whatever point of view the matter be approached, the decision in *Platt v. Woodruff* is sound and entirely consistent with *Dobson v. Pearce*.

There is one other well established rule which may at first sight seem inconsistent with the rule laid down in *Dobson v. Pearce*. The reference is to cases like *Winston v. Westfeldt*,⁶⁰ in which a court of equity ordered a negotiable instrument deliv-

⁵⁹This is because often the same facts may constitute a defense at law to a contract or note, and also constitute the basis of an equitable suit for cancellation, at least if no lawsuit has been brought.

⁶⁰(1853) 22 Ala. 760; 1 Ames, Cases in Equity Jurisdiction, 3.

ered up for cancellation. Instead of doing so, the defendant negotiated it to a holder in due course. It was held that the latter could enforce it, the negotiation having been before maturity. It may be argued that this result shows that the decree for cancellation has not the legal effects herein ascribed to it. This, however, turns out upon analysis to be a superficial view. In order to have the power to vest an indefeasible title in a holder in due course, it is not necessary that the one negotiating the instrument have any real title to it, *i. e.*, any right to recover on it himself. A thief who steals a negotiable instrument payable to bearer certainly has no right to recover on it himself, that is, the maker (if, for example, it be a promissory note) is under no duty to pay the thief, but in spite of this the latter is, on grounds of policy, given the power to do acts which result in giving one who buys in good faith and for value an indefeasible right. Recurring to our analysis as presented in Part I, the thief has no true right against the maker, (*i. e.*, the maker owes him no duty to pay) and no privilege (*i. e.*, he is under a duty to the payee not) to negotiate the note; but he does have a power to negotiate it to a holder in due course. The same may be said of the note in the principal case after the decree in equity for cancellation is entered. While in the hands of the defendant, it is not a valid note; the defendant has not a true right against the maker; and that he has not is conclusively settled by the decree in equity;⁶¹ but he has, on grounds of policy, a power to vest true rights, etc., in a holder in due course. These cases are therefore not authorities for a view contrary to that suggested. In fact, it is extremely difficult to find any modern case in which the decision really involves a principle inconsistent with that established for New York by *Dobson v. Pearce*. In closing it may be pointed out that this common sense rule is entirely analogous to the statutory power *in rem* conferred upon courts of equity to vest title to land by their decrees. May we not believe that in the case of judgments obtained by fraud, and of specialties in jurisdictions where "equitable defences" are not allowed, this development, giving to the decree of the chancellor an effect *in rem* upon the legal right involved, has already taken place in the evolution of our legal system? Is it too much to

⁶¹In the case of the negotiable note, the fraud is a defense to an action at law prior to the decree for cancellation; consequently the case differs from that of the sealed instrument. Even so, it seems it is the decree for cancellation which now constitutes a good plea in confession and avoidance, whereas before the decree the fraud itself was the defense.

expect that common sense rather than an outworn phrase shall in the future govern the relations of the two co-ordinate parts of our legal system?⁶²

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